
Cotton Corporation of India Vs Kanda Edible Oil (P) Limited and Others

Civil Misc. Appeal No. 1652/2012

Court: Rajasthan High Court

Date of Decision: Sept. 11, 2015

Acts Referred:

Arbitration and Conciliation Act, 1996 - Section 34, 34(2)(ii), 85, 85(2), 85(2)(a)

Hon'ble Judges: Vineet Kothari, J.

Bench: Single Bench

Advocate: V.K. Aggarwal and Dhankanwar Rajpurohit, for the Appellant; R.K. Thanvi Advocate Advocate and Narendra Thanvi, for the Respondent

Final Decision: Allowed

Judgement

Dr. Vineet Kothari, J.

The Cotton Corporation of India has filed the present appeal against the respondent-M/s. Kanda Edible Oil (P)

Limited, Sriganaganagar aggrieved by the order dated 07.04.2012 passed by the learned District Judge, Sriganaganagar in Civil Suit No. 247/2006

M/s. Kanda Edible Oil (Private) Limited, Sriganaganagar Vs. Cotton Corporation of India & Anr." allowing the application of the present

respondent-M/s. Kanda Edible Oil (P) Limited, Sriganaganagar filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act of

1996") setting aside the Arbitration Award dated 16.07.2006 made by the Arbitrator Shri Jitendra Parashar, Advocate.

2. The learned District Judge, Sriganaganagar has given the following reasons for setting aside the Arbitration Award dated 16.07.2006:-

3. The learned counsel Mr. Vijay Kumar Aggarwal and Dr. Dhankanwar Rajpurohit appearing for the appellant-Cotton Corporation of India

submitted that a similar controversy has been settled by this Court in an appeal arising out of the similar nature order passed by the same learned

District Judge, Sriganaganagar in the case of Cotton Corporation of India Vs. Trimurti Sales Corporation and the appeal namely, S.B. Civil Misc.

Appeal No. 1653/2012 ""Cotton Corporation of India Vs. Trimurti Sales Corporation & Anr."" was allowed by this Court on 29.07.2015

(Wednesday). The relevant portion of the observations made by this Court in the aforesaid order dated 29.07.2015 is quoted herein below for

ready reference:-

4. Having heard the learned counsels for the parties, this Court is of the considered opinion that the impugned order deserves to be set aside and

the matter deserves to be remanded back to the learned District Judge, Sri Ganganagar, for deciding again the application under Section 34 of the

Act of 1996 on its own merits. The reasons assigned by the learned District Judge in the impugned order are not sustainable, because the

arbitration reference could be made only under the Act of 1996, which was prevalent on the date of making of the arbitration reference, and

reference under the Act of 1940 in clause 15 of the Agreement between the parties could not make the reference incompetent, since in the very

same clause, the parties had agreed to refer the matter to arbitration. Clause 15 is also quoted below for ready reference:-

15. Arbitration:- If any dispute in relation to this agreement except quality then such dispute shall be referred to any arbitrator for arbitration. The

appointment of arbitrator shall be made by the Branch Manager of the concerned branch and the award of the arbitrator shall be final and binding.

In relation to the arbitrator the provision of Arbitration Act 1942/1940 will be applicable. Please return the original and other copies of the

agreement along with all the conditions within two days of the receipt of the original and duplicate copy of the agreement otherwise it will be

deemed that the purchaser has accepted the agreement and affirmed the same.

5. By reference to the Arbitration Act, 1940 [(sic), there was no Act of 1942 for arbitration in India, and therefore, obviously reference was only

made to 1940 Act]. But since the first part of clause 15 obviously indicates the agreement between the parties for referring any dispute to the

Arbitrator for arbitration, it is needless to say that the law applicable on the date of reference would apply and mere reference of 1940 Act in

clause 15 will not render such mutual agreement between the parties to refer the dispute to arbitration otiose merely because later on 1996 Act

came into force. Section 34(2)(ii) provides that:

34. Application for setting aside arbitral award.-

(1).....

(2) An arbitral award may be set aside by the Court only if-

(i).....

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the

time being in force; or.....

6. The present ground for setting aside the Arbitration award is not covered by these provisions as the law applicable would be 1996 Act, as per

the aforesaid Hon"ble Supreme Court decision.

7. Consequently, the present appeal is allowed and setting aside the impugned order dated 07.04.2012, the learned District Judge, Sri Ganganagar

is requested to decide the application under Section 34 of the Act afresh on merits, in accordance with law, after considering all the contentions

raised by the parties before it. No costs. Copy of this order may be sent to the concerned parties and the court below forthwith.

4. The learned counsel Mr. Vijay Kumar Aggarwal submitted that the Arbitration Clause referred above in this case as well as in the case of

Trimurti Sales Corporation were similar and, therefore, the present Misc. Appeal filed by the Cotton Corporation of India deserves to be allowed

and the impugned order dated 07.04.2012 which has been passed by the learned District Judge only on the ground that the Arbitration Clause No.

15 of the Agreement between the parties refer to the Arbitration Act of 1940 and despite coming into force the new Act of 1996, the Arbitral

Award made under the Act of 1940 could not be set aside because of coming into force the new Act of 1996 and the provisions of the Act of

1940 have been repealed.

5. On the other hand, the learned counsel Mr. R.K. Thanvi, Senior Advocate with Mr. Narendra Thanvi appearing for the respondent-M/s.

Kanda Edible Oil (P) Ltd., Sri Ganganagar submitted that the learned District Judge has rightly relied upon the decision of the Hon"ble Patna High

Court in the case of Rajan Kumar Verma and Another Vs. Sachchidanand Singh--> and has very rightly set aside the Arbitration Award dated

16.07.2006 by the impugned order dated 07.04.2012.

6. The learned counsel Mr. R.K. Thanvi, Senior Advocate also relied upon para-22 of the judgment of the Hon"ble Supreme Court in the case of

Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., and urged that since the arbitration proceedings were commenced in pursuance of the

Agreement executed between the parties in the year 2004, much after coming into force the new Act of 1996, the provisions of the repealed Act

of 1940 could not be invoked, therefore, the impugned Award dated 16.07.2006 was rightly set aside by the learned District Judge on this

ground. The learned counsel also submitted that the Arbitration Clause No. 15, referred to above, refer to the Act of 1940 and not the new Act of

1996 and the said Clause No. 15 of the agreement between the parties cannot be dissected and, therefore, the entire arbitration agreement would

be rendered void, as the new Act of 1996 came into force and since the new Act of 1996 has not been referred in the said arbitration clause No.

15, the arbitration proceedings undertaken under the old Act of 1940 were void and the Award made by the Arbitration was a nullity in the eye of

law and the same has very rightly been set aside by the learned District Judge, therefore, the present Misc. Appeal filed by the Cotton Corporation

of India deserves to be dismissed.

7. I have heard the learned counsels for the parties at length again despite the previous judgment rendered by this Court and have given my

thoughtful consideration to the rival submissions. In the considered opinion of this Court, the present Misc. Appeal filed by the appellant-Cotton

Corporation of India deserves to be allowed for reason that the Arbitration Clause No. 15, which is quoted herein above in the other case, is in

pari materia with the Clause No. 15, which is also quoted there in the present case. The reference to the Act of 1942/1940 [(sic), there was no

Act of 1942 for arbitration in India, and therefore, obviously reference was only made to the old Act of 1940] appears to be made due to

inadvertence in the said Clause No. 15 of the Agreement. The first half of the said Clause No. 15 clearly indicates that in case of any dispute, the

matter shall be referred to the Arbitration. This Court is of the view that if the reference to the Arbitration can be made by referring to the first half

of the Clause No. 15, there is no error in law in separating and ignoring a wrong reference of the old Act of 1940 since that was no longer on the

statute book, as the new Arbitration Act of 1996 had come into force much before the execution of the Agreement between the parties in the year

2004. Once, the new Act of 1996 came on the statute book in the year 1996, any reference to the old Act of 1940 in subsequent Agreements can

only be said to be an inadvertent error or mistake. Therefore, the contention of the learned counsel Mr. R.K. Thanvi, Senior Advocate that the

whole arbitration proceedings were void and the Award is a nullity, deserves to be rejected and is, hereby, rejected.

8. The Hon"ble Patna High Court in the aforesaid case of Rajan Kumar Verma Vs. Sachchidanand (supra) has very rightly observed in para 13

and 14 of the judgment cited at bar that Section 85(2) of the Act of 1996 repealing the old Act of 1940 provided only for an exception for saving

the proceedings commenced only when the Act of 1940 was in force and was continued even after coming into force of the new Act of 1996 and

all the parties thereto agreed that the old Act of 1940 shall apply to the said proceedings, the proceedings could be saved under the Act of 1940

but the position obtaining before the Hon"ble Patna High Court in the aforesaid case was that since in the instant case, the agreement was executed

between the parties in the year 2000 and the suit was filed in the year 2003 when the old Act of 1940 was repealed and the new Act of 1996 had

already come into force, the Court held that any of the parties cannot take help of the exception provided in sub-section (2) of Section 85 of the

new Act of 1996. The observations made in para 14 of the aforesaid judgment by the learned Single Judge of the Hon"ble Patna High Court &

this Court is in full agreement, ""that when an Act is repealed, it must be considered as if it had never existed and every one is stopped from taking

any step in accordance thereof and no relief can legally be granted on its basis.

9. The relevant portion of the observations made in para 13 and 14 by the learned Single Judge of the Hon"ble Patna High Court in the aforesaid

case of Rajan Kumar Verma (supra) is quoted herein below for ready reference:-

13. By Section 85 of the Act of 1996, the earlier Act of 1940 was repealed and the only exception is provided in sub-section (2) of the said

Section where a proceeding which had commenced when the Act of 1940 was in force and continued even after coming into force of the new Act

of 1996 and all the parties thereto agree that the old Act of 1940 shall apply to the said proceeding. But here in the instant case admittedly the

agreement was of the year 2000, whereas the suit was filed in the year 2003 when the Act of 1940 had already been repealed by the new Act of

1996. Hence, any of the parties cannot take help of the exception provided in sub-section (2) of Section 85 of the Act of 1996.

14. When an Act is repealed, it must be considered as if it had never existed and every one is stopped from taking any step in accordance thereof

and no relief can legally be granted on its basis. It may also be noted that repeal is a matter of substance and not of form. Here also it is quite

apparent that earlier Act of 1940 has been repealed by the legislature with a particular intention not binding the earlier enactment of 1940 to be

sufficient for the purposes of law. Hence, as per the provisions of the new Act of 1996, it is not possible to agree to the submissions of the

petitioner that Section 85(2)(a) of the new Act of 1996 would keep the old Act of 1940 alive for the enforcement of the agreement executed much

after repeal of the old Act in 1996 and enforcement of the new Act of 1996.

10. In para 15 of the judgment of the Hon"ble Patna High Court in the case of Rajan Kumar Verma (supra), reference to the judgment of the

Hon"ble Supreme Court in the case of Thyssen Stahlunion GMBH (supra) was also made and the same was applied correctly by the Hon"ble

Patna High Court. The relevant portion of observations made in para 15 is also quoted herein below for ready reference:-

15. The Hon"ble Supreme Court has held in its decision in the case of Thyssen Stahlunion GmbH Vs. Steel Authority of India Ltd., that new Act

of 1996 would be applicable in relation to all arbitral proceeding commenced on or after the said new Act came into force and expression ""unless

otherwise agreed"" used in Section 85(2)(a) of the Act of 1996 cannot legally be applicable to any agreement or proceeding after the

commencement of the Act, otherwise it is likely to create a great deal of confusion with regard to making reference for arbitrator.

11. On the basis of the aforesaid discussion, the Hon"ble Patna High Court proceeded to hold that the civil court cannot legally assume that the

said clause in the agreement was for reference to Arbitrator under the provision of the new Act of 1996 as it had no jurisdiction to create a new

agreement for arbitration as the parties had never agreed for any reference under the provisions of the new Act of 1996, which are quite different

from the provisions of the old Act of 1940. Therefore, the said judgment is of little help to the learned counsel Mr. R.K. Thanvi Senior Advocate

appearing for the respondent-M/s. Kanda Edible Oil (P) Ltd., Sriganaganagar.

12. The judgment of the Hon"ble Supreme Court in the aforesaid case of Thyssen Stahlunion (supra) has already been applied by this Court in the

previous judgment in the case of Cotton Corporation of India Vs. Trimurti Sales Corporation & Anr., decided on 29.07.2015, vide quoted

portion above and, therefore, the present matter also deserves to be sent back to the concerned learned District Judge to re-decide the application

under Section 34 of the Act of 1996 of the applicant in terms of the provisions of the new Act of 1996 and not on the basis of provisions of

repealed Act of 1940.

13. Accordingly and in view of the above, the present Misc. Appeal filed by the appellant-Cotton Corporation of India is allowed and the order

dated 07.04.2012 of the learned District Judge is set aside. The learned District Judge, Sri Ganganagar is requested to decide again the application

under Section 34 of the Act afresh on merits, in accordance with law viz., the provisions of the Act of 1996, after considering all the contentions

raised by the parties before it. No costs. Copy of this order may be sent to the concerned parties and the court below forthwith.